

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1278

To be argued by Howard Weintraub

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

THE MERCHANT DIAMOND GROUP, INC.,
Appellee

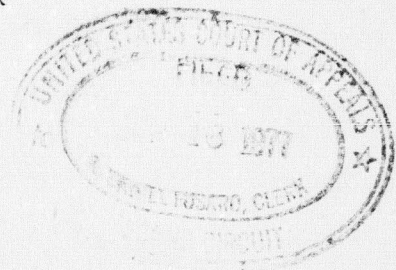
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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No. 77-1278

UNITED STATES OF AMERICA,
Appellant

v.

THE MERCHANT DIAMOND GROUP, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ISSUE PRESENTED

Whether the district court erred in allowing appellee to attack a facially valid and sufficient search warrant affidavit by challenging the accuracy of information conveyed to the affiant by an informant and correctly represented by the affiant.

RULE INVOLVED

Rule 41(e) F.R.Crim.Proc. provides:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be

restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT

Pursuant to 28 U.S.C. 1291, the United States appeals from an order (App. 4-5) of the United States District Court for the Western District of New York (Curtin, J.) entered on June 23, 1977, which granted appellee's motion under Rule 41(e), F.R.Crim.Proc. for the return of property obtained as a result of searches and seizures.^{1/} These searches, which were authorized by warrants issued by Judge Curtin and the Honorable William G. Heffron, Erie County Court Judge, resulted in the seizure of numerous

^{1/} 28 U.S.C. 1291 provides in pertinent part:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ***

Here, the ruling of the district court is a final order in an independent plenary proceeding. Under DiBella v. United States, 369 U.S. 121, 131-132 (1962), which concerned the question of appealability of preindictment motions for suppression of evidence and return of property, the Court ruled that "[o]nly if the motion is solely for the return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent" and constitute the basis for a final judgment essential to jurisdiction on appeal. As of the present time there is no "outstanding * * * complaint * * * arrest * * * arraignment, information or indictment" (DiBella, supra, 369 U.S. at 131) against appellee or any of its officers.

business documents, books, records, approximately 140 diamonds, and other property belonging to appellee (App. 31-54, 57-65). Two court orders were also issued for the freezing and seizing of appellee's bank accounts containing funds amounting to \$429,993.08 (App. 55-56, 60-62).

1. The Issuance Of Court Authorized Searches And Seizures.

Appellee is a Florida corporation that sells diamonds as investment commodities to the public. Since September 16, 1976, appellee has been qualified to do business in New York State, maintaining an office in Buffalo, New York. Appellee is a wholly owned subsidiary of Merchant Diamond Group, Ltd. (MDG, Ltd.), which was incorporated in the province of Ontario, Canada on April 17, 1974 (App. 8-9, 71-72).

On April 13, 1977, Federal law enforcement officers obtained a warrant (App. 31) from Judge Curtin for the search of the Buffalo business premises of appellee. The warrant authorized the seizure of business, personnel and financial records, and other documents and items that were of value as "evidence, fruits and instrumentalities" of violations of 18 U.S.C. 371, 1341 and 1343.^{2/} On the same day Judge Curtin issued another search warrant (App. 43-44) authorizing United States postal inspectors to seize and detain any packages containing diamonds which were delivered to a Buffalo post office by agents or employees of

^{2/} 18 U.S.C. 1341 prohibits fraud by mail; 18 U.S.C. 1343 prohibits fraud by wire.

appellee. On April 14, 1977, the judge issued a warrant (App. 50) for the search and seizure of the contents of a safe deposit box maintained in the name of appellee in the Marine Midland Bank in Buffalo. These three warrants were executed on April 14, 1977 (App. 6-7).^{3/} Later that day, Judge Curtin also issued an order (App. 55-56) directing the above bank to freeze appellee's bank accounts -- totalling an amount of \$429,993.08 -- for a period of thirty days.^{4/} On April 15, 1977, the government obtained and executed a warrant (App. 60-62) from a judge of the Erie County Court, State of New York,^{5/} authorizing it to enter appellee's bank and identify all accounts of appellee and to obtain any records and documents relating to those accounts. This procedure

^{3/} Searches were also conducted on this day of MDG, Ltd. in Toronto and of London Merchants, Inc., another retail diamond investment business, in New York City (App. 514; Addendum at 1a-2a). Three principals of MDG, Ltd. were arrested on April 14, 1977 for defrauding the public, use of the mails to defraud, and conspiracy (App. 514-515).

A Rule 41(e) motion for return of property was made by London Merchants, Inc. before District Judge Haight. As in the present case, the warrant for the search of that company was premised on the affidavit of another postal inspector who had been in communication with the RCMP. The motion was denied without prejudice to its renewal following this Court's decision of the instant case (A copy of Judge Haight's opinion is attached as an Addendum to this brief).

^{4/} On May 13, 1977, this order was extended by Judge Elfvin for an additional thirty days (App. 66-67). On June 10, 1977 and June 17, 1977, Judge Curtin ordered that the freeze on appellee's bank accounts be continued (App. 2, 120).

^{5/} The government's affidavit for the search warrant averred that no federal district judge or United States magistrate was available in Buffalo on that day and that prompt execution of the warrant was necessary to preserve the evidence sought to be seized (App. 59).

was to be conducted "in the least disruptive manner possible and with appropriate assistance of bank personnel" (App. 61). Also pursuant to this order, funds in appellee's savings account amounting to \$20,625.31 were seized (App. 64).

2. The Affidavit In Support Of The Search Warrants and Court Orders.

All of the warrants and orders were based on the affidavit of Ronald L. Snyder, a United States Postal Inspector (App. 20-30). In his affidavit, Inspector Snyder stated that on April 5 and 7, 1977 he had met with Corporal Ross Kossatz of the Commercial Crimes Section of the Royal Canadian Mounted Police (RCMP) and was informed that the RCMP had been conducting an investigation of the retail diamond investment business in Toronto, Canada for approximately the last two years. The RCMP informed Snyder that in addition to the investigative techniques usually employed in similar fraud investigations, it had also conducted court authorized electronic surveillance of various telephone facilities in Toronto from February 2, 1977 through March 31, 1977 (App. 21).^{6/}

The RCMP told Snyder that its investigation had shown that MDC, Ltd. was a Canadian corporation which purchased cut and polished diamonds at wholesale prices and then sold them at retail prices as investment commodities to customers throughout Canada and the United States. According to the RCMP, appellee on

^{6/} This surveillance was pursuant to the Canadian Protection of Privacy Act, Snow's Crim. Code, §178.1-178.23 (1974).

September 16, 1976, had filed its application, signed by the president of MDG, Ltd., for authority to do business in New York State (App. 22, 24). The RCMP's investigation had disclosed that calls were made on a daily basis from October 19, 1976 to January 7, 1977,^{7/} and from February 2, 1977, through March 31, 1977, between MDG, Ltd. in Toronto and appellee in Buffalo. A review of all the monitored telephone calls established the inter-relationship between the two companies: MDG, Ltd. instructed appellee as to the disposition of payments received for diamonds purchased by customers in the United States; MDG, Ltd. instructed appellee on personnel policies of its office and the policies for dealing with customers; appellee in turn requested the names of potential customers from MDG, Ltd.; and MDG, Ltd. and appellee discussed the relative abilities of appellee's salesmen to "'pitch confidence'" to customers in their sales promotions (App. 25-26).

The RCMP informed Snyder that their investigation had disclosed that MDG, Ltd.'s sales of diamonds were the result of fraudulent inducements to potential customers, conducted through telephone solicitations of selected customers (App. 22). Specifically, the RCMP told Snyder that from a surveillance of more than a thousand telephone calls it had discovered the four following mis-

^{7/} This information had been obtained by the RCMP pursuant to a search warrant served on the Bell Telephone Company of Canada, whereby the operating and billing records for various telephones listed to MDG, Ltd. were seized (App. 25).

representations made by MDG, Ltd. to potential customers (App. 22-24):

1. The diamonds being offered to the customers will, based on past performance, appreciate in value at the rate of 33% to 60% per year.
2. There is a ready market for the resale of diamonds so that the customer may liquidate his diamond holdings at will.
3. Merchant, Ltd. will buy back at prevailing retail prices any diamonds purchased from it.
4. The appraised value of the diamonds sold to the customer will be determined by an independent gemologist who is a member of the Gemological Institute of America.

The RCMP had concluded that the first claim was fraudulent after being advised by Robert Arend, a member of the Gemological Institute of America and a recognized expert in the field of gemology, that in recent years the value of diamonds had appreciated at a maximum rate of between approximately 8 and 9 per cent per year (App. 22). Moreover, according to Snyder, Arend had told the RCMP that this rate applied to raw uncut diamonds, which appreciated in value at a faster rate than the cut and polished diamonds sold by appellee (ibid).

As to the second claim by MDG, Ltd., the RCMP informed Snyder that it had contacted numerous experts in gemology, diamond importing, and related fields, who had told it that no retail market existed for the resale of diamonds and that the only ready market for diamonds was at the wholesale level. Since appellee sold diamonds to its customers at retail prices, which varied

from 200 per cent to 300 per cent of their wholesale price, a customer had no ready market in which to dispose of his diamonds unless he was willing to sell on the wholesale market at a substantial loss (App. 23). Moreover, the RCMP had advised Snyder that in a telephone conversation between George Doren, the president of MDG, Ltd., and an attorney of one of MDG, Ltd.'s customers, Doren acknowledged that unless MDG, Ltd. was willing to buy back a customer's diamonds, the customer would be forced to sell on the wholesale market at a considerable loss (ibid.).

Regarding the third representation by salesmen of MDG, Ltd. (that the company would buy back purchased diamonds at prevailing retail prices), the RCMP had informed Snyder that a complete review of the electronic interceptions revealed that MDG, Ltd. had failed to honor buy-back arrangements with its customers in the vast majority of instances where they sought to have the company purchase the diamonds (App. 23). Snyder was apprised that since surveillance had been initiated on February 2, 1977, MDG, Ltd. had bought back diamonds on only ten occasions (ibid.). Furthermore, electronic surveillance had revealed that on March 21, 1977, Doren told MDG, Ltd.'s office manager that buy-backs must be limited to a maximum of 7 per cent of sales (App. 24).

Finally, as to the fourth claim regarding the qualifications of the company's gemologist-appraiser, Inspector Snyder stated that the appraiser for the company was Theodore J. Calderia and that a check of the records of the Gemological Institute of America indicated that Calderia was not listed as a member. Further,

although the sales brochure mailed by MDG, Ltd. to potential customers listed Robert Arend as its appraiser, Arend had advised the RCMP that he had refused to serve as the company's appraiser and that the appearance of his name in the brochure was unauthorized and misleading (App. 24).

3. The Rule 41(e) Hearing.

On June 8, 1977, appellee sought an order in the district court pursuant to Rule 41(e), F.R.Crim.Proc. (App. 70-112) for the return of the seized property. Appellee claimed that the Snyder affidavit in support of the search warrants and court orders contained "inaccurate, misleading and * * * false representations by the government", resulting in a lack of probable cause to substantiate the searches and seizures (App. 90). From June 20, 1977, through June 22, 1977, the court conducted an evidentiary hearing on appellee's motion "to test whether [the information set forth in the Snyder affidavit] is true or false[;] whether the agent's representations to the Court were based upon fact or were not" (App. 458).

Judge Curtin concluded that "[a]fter listening to the testimony of the witnesses, it appears that [Snyder's] affidavit contains a number of inaccuracies" (App. 13). The judge found, first, that appellee had presented evidence refuting Snyder's claim, based on the RCMP's information, that MDG, Ltd. had fraudulently represented that diamonds appreciate in value at the rate of 33 per cent to 60 per cent per year (App. 15). Rather, invoices of diamonds purchased by appellee from September, 1976,

through March, 1977, produced by appellee at the hearing, showed that the cost of diamonds to appellee had appreciated at a rate of 15 to 37 per cent during that period of time, and Mr. Arend testified that there had been a "phenomenal increase in the value of diamonds in the last year" (ibid.).^{8/} Moreover, Arend explained that the RCMP's statement to Inspector Snyder that rough diamonds increased at a faster rate than those sold by appellee was mistaken and that apparently the RCMP had misunderstood what he had told it, since cut and polished diamonds actually appreciated at a faster rate than rough ones (App. 15-16).

As to the claim, based on the opinion of the RCMP's experts, that appellee had misrepresented the existence of a ready market for resale of diamonds, the court credited the testimony of Arend that "when a person bought a diamond at retail and attempted to sell it immediately back to a merchant, he could get only about 20 to 25 per cent of the selling price" (App. 16-17). But the court felt that this situation "should be considered along" (App. 17) with appellee's buy-back policy, to which the court next turned.

^{8/} Contrary to the court's finding that Arend (called by the government in rebuttal at the hearing) had testified that appellee's records of purchases and sales "were not out of line with the experience in the industry generally" (App. 15), our review of the record shows that this statement was made by a witness called by appellee. See App. 363-364. Furthermore, Arend, in his testimony, consistently maintained that after the exchange of currency factor in purchasing diamonds was eliminated, the appreciation of the value of an average diamond was 10 per cent a year. See App. 436-445.

The court found that, as against the RCMP's statement to Snyder that a review of the intercepted telephone conversations revealed only ten instances of buy-backs of customers' diamonds by appellee, appellee had presented business records at the hearing indicating that there had been at least 42 occasions in which customers resold their diamonds to MDG, Ltd. (ibid.). Finally, as to the affidavit's claim that appellee was improperly using Arend's name in its promotional literature, the court noted that Arend testified that it was not until April 7, 1977 -- six days before the application for the search warrant -- that he notified appellee that he no longer wished to have his name utilized in the sales promotion (App. 17-18).^{9/}

Because the court concluded that appellee had established "a number of material inaccuracies in the postal inspector's affidavit" (App. 18), it considered production of the tapes made by the RCMP "essential" to "determin[ing] what actually was represented to the customers" (App. 13). The government was

9/ Although the affidavit did not assert that appellee had misleadingly sold diamonds of inferior quality, but merely stated that appellee purchased "diamonds of widely varying quality" (App. 22), Judge Curtin noted that Arend had testified that all of the diamonds he had purchased for MDG, Ltd. were of high quality (App. 18). However, Inspector Snyder also testified that the RCMP had told him that James Brown, a Canadian gemologist, had appraised approximately 50 diamonds purchased by customers from MDG, Ltd. which had approximately half the value attributed to them by the company's appraiser (App. 411). Even Arend testified that the appraisals that the company wanted for its diamonds were too high and "as far as [he was] concerned, misleading" (App. 492-493).

unable to produce the tapes, however.^{10/} The court therefore concluded that "[w]ithout the ability to review the RCMP tape, I cannot find sufficient basis to refute the petitioner's evidence and to establish probable cause of MDG's fraud upon customers in the United States." (App. 19).^{11/}

^{10/} At the time the government had applied for the warrant authorizing the search of appellee's premises, it had represented to Judge Curtin "that the tapes would be available for proceedings in [the] court" (App. 13). (See App. 187, 530). When the court wanted the tapes produced during the hearing, however, the government informed the court that it had since conferred with the Crown Attorney in Canada and been told that the tapes could not be made available at that particular time. The government also stated that it understood that a preliminary hearing as to the disclosure of the tapes would be held in Canada in October, and it surmised that at that time the tapes could probably be made public (App. 539-540). Judge Curtin had also recognized the procedural difficulties and time problems involved in obtaining the tapes (App. 540-541). (See App. 223-225, 232).

We note parenthetically, as to appellee's contention below that the disclosure of the tapes by the RCMP to Snyder was in violation of Canadian law (App. 13-15, 83), that conflicting evidence was presented at the hearing on the legality of such disclosure (App. 14, 209-243, 315-348). In any event, the use of the tapes by Snyder would only have been a possible violation of Canadian statutory procedure, and evidence obtained by foreign police officials not acting in concert with United States authorities -- even in violation of Fourth Amendment standards -- is admissible in United States courts unless the method of obtaining the evidence shocks the conscience of the court. E.g., United States v. Callaway, 446 F.2d 753, 755 (3rd Cir. 1971), cert. den., sub nom., De Vyver v. United States, 404 U.S. 1021; Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967), cert. den., 389 U.S. 986; Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965), cert. den., 382 U.S. 963. See, United States v. Wolfish, 525 F.2d 457, 463 (2nd Cir. 1975), cert. den., 423 U.S. 1059; United States v. Nagelberg, 434 F.2d 585, 587 (2nd Cir. 1970), cert. den., 401 U.S. 939.

^{11/} The court reached this conclusion although Corporal John Rowland of the RCMP, who had listened to more than a thousand of the intercepted telephone calls (App. 518), was present in the courtroom and had testified as a government witness. Judge Curtin refused, however, to allow him to testify as to his "recollection of what is in the tapes" because this would not have provided appellee with sufficient opportunity "to test out the conclusion[s in the affidavit]" or "an opportunity at all to cross examine" (App. 519-520, 529-531, 535).

In so concluding, the court emphasized that "I am not blaming Mr. Snyder because I think that some of the information given to him * * * appears[,] from what we have heard from Mr. Arend and from the analysis made which Mr. Arend disagrees with of sales[,] that there were some inaccuracies in his affidavit based on the information that he received from the RCMP" (App. 546). ^{12/}

On June 23, 1977, the court ordered the return of all of appellee's property which was "unlawfully seized" by the government, vacated the earlier orders freezing appellee's bank accounts, and directed Marine Midland Bank to release appellee's bank accounts (App. 4-5).

^{12/} Snyder testified at the hearing that his interviews with the RCMP "were extensive, approximately sixteen hours on [April 7, 1977]" (App. 412), and that the information contained in his affidavit was based "entirely" on what he was advised of by the RCMP, his listening to some of the tapes of the intercepted telephone conversations, and interviews he conducted with post office personnel at a Buffalo post office (App. 400, 405-406, 414-415, 419-420).

ARGUMENT

- A. THE DISTRICT COURT ERRED IN ALLOWING APPELLEE TO ATTACK A FACIALLY VALID AND SUFFICIENT SEARCH WARRANT BY CHALLENGING THE ACCURACY OF INFORMATION CONVEYED TO THE AFFIANT BY AN INFORMANT AND CORRECTLY REPRESENTED BY THE AFFIANT

1. This case presents, in stark form, the issue of whether a facially sufficient affidavit in support of a search warrant may be impeached by extrinsic evidence of inaccuracies in the affidavit that are not attributable to either deliberate or negligent misrepresentation by the affiant. We submit that the law is well settled in this Circuit that a showing of probable cause on the face of an affidavit may not be defeated by evidence that an informant erred (or even lied) about the information provided to the affiant so long as the affiant has accurately represented, or has not negligently misrepresented, to the magistrate what he was told. We submit that Judge Curtin far exceeded this limited scope of review of the validity of a facially sufficient affidavit permitted by this Court and therefore erred as a matter of law.^{13/}

We note, as a preliminary matter, our understanding that the judge's order, although issued in response to a F.R.Crim.Proc. 41(e) motion for return of property, will (unless reversed) effectively preclude use of the seized evidence by the government at a future

^{13/} Although we did not object below to the scope of the inquiry conducted by the court, we submit that we are not precluded from raising the claim here, because the extent of judicial inquiry into a facially valid affidavit involves a question of law. See also, Estate of Sanford v. Commissioner of Internal Revenue, 308 U.S. 39, 51 (1939); United States v. Banerman, 552 F.2d 61, 63 (2nd Cir. 1977); United States v. Tortorello, 533 F.2d 809, 812 (2nd Cir.

trial in this case. Rule 41(e) provides that "[a] person aggrieved by an unlawful search and seizure" may seek return of property "on the ground that he is entitled to lawful possession of the property which was illegally seized." A determination of illegal seizure for Rule 41(e) purposes would logically seem to have preclusive effect on the use of such evidence at a future trial. As the Sixth Circuit has held, the granting of a Rule 41(e) motion "serves not only to restore possession of seized property to its owner, but also serves as a ruling that the search and seizure of the property were illegal, and that the fruits of the search 'shall not be admissible in evidence at any hearing or trial.'" United States v. Giacalone, 541 F.2d 508, 512 (6th Cir. 1976) (en banc). Therefore the court's determination of an unlawful search and seizure "will be binding on all courts in future criminal litigation" (id. at 512). See United States v. Klapholz, 230 F.2d 494, 498 (2nd Cir. 1956), cert. den., 351 U.S. 924; compare Richey v. Smith, 515 F.2d 1239, 1245 (5th Cir. 1975) with Lord v. Kelley, 223 F.Supp. 684, 690-691 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. den., 379 U.S. 961.

2. To enforce the Fourth Amendment's protections against unjustified intrusions into the privacy of citizens, searches must be based on the existence of probable cause and whenever possible,

13/ (CONT'D) 1976), cert. den., 429 U.S. 894. In any event, the court's ruling was plain error affecting the government's substantial rights and thus cognizable on appeal. Rule 52(b), F.R.Crim.Proc.

the probable cause determination must be made by a neutral and detached magistrate. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 112-113 (1975); Johnson v. United States, 333 U.S. 10, 13-14 (1948); United States v. Lewis, 392 F.2d 377, 379 (2nd Cir. 1968), cert. den., 393 U.S. 891. The purpose of an affidavit in support of a search warrant is to enable the magistrate to judge for himself the persuasiveness of the facts relied on by the affiant to show probable cause. See, e.g., Giordenello v. United States, 357 U.S. 480, 486-487 (1958); United States v. Warden of Attica State Prison, 381 F.2d 209, 215-216 (2nd Cir. 1967). In making this assessment, the magistrate does "not serve merely as a rubber stamp for the police" (Aguilar v. Texas, 378 U.S. 108, 111 (1964); accord, United States v. Karathanos, 531 F.2d 26, 29, 33 (2nd Cir. 1976), cert. den., 428 U.S. 910; United States v. Warden of Attica State Prison, supra, 381 F.2d at 216), but must "issue search warrants only when the facts are sufficient to satisfy a reasonably prudent detached and neutral person that a crime is being committed * * *." The validity of the magistrate's finding of probable cause must withstand later scrutiny on a review limited to the facts presented to him at the time the affiant applied for the warrant. See, e.g., Spinelli v. United States, 393 U.S. 410 (1969); Jones v. United States, 362 U.S. 257, 267-271 (1960); United States v. Burke, 517 F.2d 377, 381 (2nd Cir. 1975).

Because of the importance of the search warrant in our constitutional jurisprudence, the requirement of a factual showing

of probable cause to the magistrate "obvious[ly] assum[es] * * * that there will be a truthful showing" United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966) (emphasis in original), since the goal of protection against unlawful searches and seizures could not be "accomplished if the judicial officer is put upon by the police" United States v. Dunnings, 425 F.2d 836, 840 (2nd Cir. 1969), cert. den., 397 U.S. 1002. Consequently (and because search warrants are issued in ex parte proceedings) this Court has permitted the victim of a search to challenge the truth of an affiant's factual representations of probable cause to a magistrate. Specifically, impeachment of a facially valid affidavit has been allowed by a showing that the affiant either purposefully lied to the magistrate or negligently presented a falsehood of material importance to the finding of probable cause.^{14/} E.g., Mapp v. Warden, New York State Correctional Institution For Women, 531 F.2d 1167, 1173 (2nd Cir. 1976), cert. den., 429 U.S. 982; United States v. Pond, 523 F.2d 210, 213-214 (2nd Cir. 1975), cert. den., 423 U.S. 1058; United States v. Gonzalez, 488 F.2d 833, 837-838 (2nd Cir. 1973). See, e.g., United States v. Schwartz, 535 F.2d 160, 163 (2nd Cir. 1976); United States v. Steinberg, 525 F.2d 1126, 1131 (2nd Cir. 1975), cert. den., 425 U.S. 971; United States v. La Vecchia, 513 F.2d 1210, 1217-1218 (2nd Cir. 1975); United States v. Dunnings, supra, 425 F.2d at 839-840; United States v. Freeman, 358 F.2d 459, 463 n. 4 (2nd

^{14/} A recklessly untruthful and material statement by the affiant may also void an otherwise valid warrant. See, United States v. Gonzalez, 488 F.2d 833, 837 (2nd Cir. 1973).

15/

Cir. 1966), cert. den., 385 U.S. 882. As one commentator has stated, by preventing law enforcement officers "from intentionally or negligently falsifying their affidavits in the hope that the resulting search will yield conclusive proof of criminal conduct" (Kipperman, Inaccurate Search Warrant Affidavits As A Ground For Suppressing Evidence, 84 Harv. L. Rev. 825, 830 (1971)), the Fourth Amendment exclusionary rule's purpose of deterring official misconduct is significantly enhanced.

Equally settled, however, is the principle that "[p]robable cause is not defeated because an informant may have erred or lied, 'as long as the affiant accurately represented what was told him' * * * and there is no evidence that [the affiant] misrepresented what he was told." Kahn v. Flood, 550 F.2d 784, 786 (2nd Cir. 1977). As the Court has previously said, "the accuracy of the information provided by the informant is not relevant[;] [p]robable cause is established if the facts alleged by the informant, if true, establish illegality and the affiant-agent has reasonable grounds for believing in the truth of the allegations." United States v. Perry, 380 F.2d 356, 358 (2nd Cir. 1967), cert. den., 389 U.S. 943. Accord, Mapp v. Warden, supra, 531 F.2d at 1172-1173;

15/ See also, .g., United States v. Lee, 540 F.2d 1205, 1208-1209 (4th Cir. 1976), cert. den., 429 U.S. 894; United States v. Prewitt, 534 F.2d 200, 201-202 (9th Cir. 1976); United States v. Park, 531 F.2d 754, 758-759 (5th Cir. 1976); Berard v. United States, 525 F.2d 319, 321-322 (8th Cir. 1975), cert. den., 425 U.S. 913; United States v. Luna, 525 F.2d 4 (6th Cir. 1975), cert. den., 424 U.S. 965; United States v. Armocida, 515 F.2d 29, 41 (3rd Cir. 1975), cert. den., sub nom., Conti v. United States, 423 U.S. 858; United States v. Damitz, 495 F.2d 50, 52-56 (9th Cir. 1974); United States v. Marihart, 492 F.2d 897, 899-901 (8th Cir. 1974), cert. den., 419 U.S. 827; United States v. Carmichael, 489 F.2d 983 988-989 (7th Cir. 1973) (en banc).

United States v. Sultan, 463 F.2d 1066, 1070 (2nd Cir. 1972);

United States ex rel. DeRosa v. LaVallee, 406 F.2d 807, 808 (2nd Cir. 1969), cert. den., 396 U.S. 854.^{16/}

In the case at bar, the affiant "accurately represented what was told him" by the informant, the RCMP. Indeed, Judge Curtin's opinion can not reasonably be read to so much as intimate a contrary finding.^{17/}

Rather, the district judge concluded that despite the facial sufficiency of the affidavit to show probable cause, the "informant [had] erred" (Kahn v. Flood, supra, 550 F.2d at 786) and the inaccuracies in its information undermined probable cause. Such an inquiry into the truth or falsity of the informant's representations, unrelated

16/ See Rugendorf v. United States, 376 U.S. 528, 532-533 (1964), (where the Supreme Court held that assuming a facially valid affidavit could be attacked, the search warrant in that case was valid because the two factual inaccuracies depended upon by the defendant to destroy probable cause were not made by the affiant and thus "did not go to the integrity of the affidavit"); Dumbra v. United States, 268 U.S. 435, 441 (1925); United States v. Brown, 548 F.2d 204, 208 n. 3 (7th Cir. 1977); United States v. Wong, 470 F.2d 129, 132 (9th Cir. 1972); and cases cited at note 15 supra.

17/ The judge's view is summed up in his statement, already quoted that:

I am not blaming Mr. Snyder because I think that some of the information given to him * * * appears[,] from what we have heard from Mr. Arend and from the analysis made which Mr. Arend disagrees with of sales[,] that there were some inaccuracies in his affidavit based on the information that he received from the RCMP.

And as noted earlier, Snyder testified at the hearing that the information contained in his affidavit was based "entirely on what he was advised of by the RCMP, his listening to some of the tapes of the intercepted telephone conversations, and interviews he conducted with post office personnel at a Buffalo post office.

to (at a minimum) negligent conduct by the affiant, is flatly prohibited by this Court's decisions.

As Judge Curtin's order makes clear, each of the four principal allegations of fraudulent misrepresentation by appellee set forth in the affidavit stemmed directly from information conveyed to Inspector Snyder by the RCMP (see App. 10-11). As to each of these allegations (but see part B, infra), however, Judge Curtin found that testimonial or documentary evidence adduced at the suppression hearing contradicted or was inconsistent with the information from the RCMP on the basis of which it (and the affiant) had concluded that appellee was engaged in fraud. Thus, for instance, the RCMP's information from an expert, which Snyder transmitted to the issuing judge, was that rough diamonds appreciated annually at about 8 to 9 per cent, contrary to appellee's representations of a 33 to 60 per cent yearly appreciation; but appellee's invoices from its suppliers, introduced at the hearing, showed that its diamonds had appreciated at a rate of 15 to 37 per cent during the relevant period. Therefore, Judge Curtin concluded (the government not having "refuted" this evidence at the hearing) the RCMP's information to Snyder on this point could not be credited and probable cause had to be discounted pro tanto. Similarly, as to the RCMP's information to the affiant that appellee only rarely bought back diamonds from its customers (contrary to its representations), Judge Curtin found that at the hearing appellee had "presented evidence from its own records" showing many more such repurchases by appellee, and "[t]his

evidence was unrefuted by the Government" (App. 17). Probable cause therefore had to be discounted by this evidence also. Moreover, this same evidence of repurchases was apparently sufficient, in Judge Curtin's view, to undermine the RCMP's further representation to Snyder that no ready resale market existed for the diamonds purchased by appellee's customers.

By thus permitting a full-dress inquiry into the basis for Inspector Snyder's belief that appellee had engaged in fraud, the district judge lost sight of the purpose of a probable cause hearing, which is to determine whether the "facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged * * *" Dumbra v. United States, supra, 268 U.S. at 441. Inspector Snyder had reasonable grounds -- conveyed to him by a reliable informant -- to believe that a crime had been committed. The fact that extrinsic evidence not conveyed to him may or may not have been consistent with this belief was immaterial to the determination required in a probable cause hearing. Indeed, the hearing conducted by the district judge here was little short of a trial on the merits of appellee's intent to defraud its customers, "requir[ing] proof sufficient to establish guilt in order to substantiate the existence of probable cause." Brinegar v. United States, 338 U.S. 160, 173 (1949). The following remark by the court at the hearing is indicative of the nature of the inquiry it undertook (App. 530-531):

I made a bad mistake in this case and furthermore, what is fraud. We have a system where a seller goes out in the market whether he is operating a fruit stand or if he is selling diamonds. He has the right to advertise and to say, "ladies and gentlemen, these are the best tomatoes and the best peaches you will ever get. You can't get any better and if you take them home and put them in your freezer overnight they will be worth two or three times in value the next day." You may say that anybody who would buy that sales talk is stupid, but the point is in our society if a person has the funds, if he has the money he has the right to be stupid and if he wants to invest his money in a scheme like this then perhaps he should have the right to do it and that is what it comes to. We are not a society where our hands are held night and day and uncle government is going to say, "yes, you can invest in savings bonds but you can't invest in gold bullion," or strike "gold" out because we have had that out before, or diamonds or in expensive automobiles * * *.

But whether appellee's salesmen were merely exercising "the right to advertise" in its representations to prospective customers or whether those representations amounted to fraud was an issue to be decided by the trier of fact at a trial on the merits, not in a motion for the return of property seized pursuant to search warrants. See also, United States v. Bast, 495 F.2d 138, 142 ^{18/} (D.C. Cir. 1974).

^{18/} In Bast, the defendants were indicted for, among other things, possessing, distributing and advertising devices for the interception of wire and oral communications, in violation of 18 U.S.C. 2512. Evidence had been seized pursuant to a search warrant issued upon an affidavit that alleged primarily the defendants' use of a brochure advertising the sale of a recorder which "secretly tapes a conversation * * * IN YOUR SHIRT POCKET." The court of appeals reversed the district court's suppression order predicated on a finding that the brochure did not establish probable cause. It said (id. at 142):

(FOOTNOTE CONT'D)

Unquestionably, Judge Curtin was influenced in conducting the inquiry that he did by the fact that the government had seized papers and property arguably necessary to the continued functioning of appellee's business and had frozen its bank accounts containing \$429,993.08.^{19/} But neither the nature of the property seized nor

18/ (CONT'D)

While the tendency and character of the brochure involve factual matters that would ultimately have to be determined at trial, the brochure provided "probable cause" to believe that sending it was a violation of the statute. There was at least a reasonable possibility that a trier of fact would conclude that defendant had willfully placed this advertisement in order to promote use of the recorder to tape conversations under circumstances in which the recorder is concealed and the participants are unaware of the interception * * *. Therefore there was "probable cause" to believe the brochure "promotes the use of such [electronic] device for the purpose of the surreptitious interception," in violation of the advertising prohibition of §2512 * * *.

It may be that this phrase in the brochure is susceptible of a convincing alternative interpretation which would not violate the advertisement proscription, but that is a matter for trial. All we say here is that the magistrate could reasonably have issued the warrant * * *. The affiant seeking a warrant and the issuing magistrate have some latitude in their interpretation of evidence before them, and evidence may support a warrant even though later held insufficient to support conviction.

19/ As the judge stated (App. 396), "we have all these diamonds and all of this money[,]" and "[w]e must decide this matter expeditiously." We note, however, that although the seizures occurred on April 14 and 15, 1977, appellee did not file its Rule 41(e) motion until June 8, 1977 (see also Addendum, *infra*, at 3a-4a). On April 21, 1977, the court had ordered that the Snyder affidavits and applications in support of the search warrants and freeze orders be sealed for a maximum period of 60 days, to permit the RCMP to continue its investigation (App. 1, 132-133). At the same time, the court advised counsel for appellee that the sealing order did not preclude him from filing "any application for any relief you

the effect of the seizure upon a going business authorized the judge to apply an impermissible standard of review of the sufficiency of an affidavit to support a search warrant. That is especially true if, as appears to be the law (pp. 14-15, supra), a decision on a Rule 41(e) motion that a search was illegal bars the use of the seized evidence in future criminal proceedings. Moreover, had the judge conducted a proper inquiry into the validity of the affidavit -- and accordingly held that the search and seizures were legal -- appellee would not have been barred from nevertheless requesting the return of its property under conditions which guaranteed its availability to the government in the event of a criminal prosecution. The government does not now oppose such an agreement, provided that adequate safeguards are fashioned to secure the integrity and continued availability of the evidence.

In sum, the district judge ruled that the seizure of appellee's property was illegal based upon extrinsic evidence impeaching the accuracy of information conveyed to the affiant, correctly represented by him in the affidavit, and sufficient on its face to establish probable cause. In so ruling, the judge exceeded the scope of review of a facially sufficient affidavit enunciated by this Court, and erred as a matter of law.

19/ (CONT'D) feel is appropriate, for the return [of the property]" (App. 170). Pursuant to a motion filed by the government on April 27, 1977 for the unsealing of the various applications and affidavits, the court ordered the unsealing of all the documents on April 28, 1977 (App. 2).

B. THE DISTRICT COURT ERRED IN REQUIRING THE GOVERNMENT TO PRODUCE THE TAPES OF THE CONVERSATIONS MONITORED BY THE RCMP IN ORDER TO "REFUTE" THE EVIDENCE OF INACCURACIES IN THE INFORMATION PROVIDED BY THE RCMP

1. Having found by extrinsic evidence that the information regarding fraudulent practices by appellee, which the RCMP furnished to Inspector Snyder, contained "material inaccuracies", Judge Curtin concluded that he needed the tapes of the conversations monitored by the RCMP "[i]n order to determine what actually was represented to the customers" by appellee (App. 13). In thus requiring the government to produce the tapes in order to "refute [appellee's] evidence" (App. 19) that its conduct was not fraudulent, and granting appellee's motion when the government could not do so, the court compounded its initial error in permitting appellee to introduce extrinsic evidence to impeach the accuracy of the RCMP's information.

Appellee did not challenge at the hearing the RCMP's description of its representations to its customers -- for example, that it would buy back at prevailing prices any diamonds purchased from it and that its diamonds appreciated at a certain rate. Its defense was that its practice essentially conformed to its representations -- that, for example, its records showed it had bought back many more diamonds than the RCMP alleged and that the diamonds it sold appreciated at a much faster rate than the RCMP's expert had alleged was possible in the trade. Consequently, Judge Curtin's holding that the tapes were necessary to determine "what actually was represented" to appellee's customers must mean

that he was prepared to examine the tapes for additional evidence -- not contradicted by the evidence at the hearing -- to establish probable cause of fraud by appellee. But consideration of such evidence that was not before the judge at the time of issuance of the warrants would plainly have been impermissible under the principles set forth in part A, supra at pp. 15-16. It was therefore error for the court to grant appellee's motion when the government was unable to produce the tapes.^{20/}

20/ Even if the court could review de novo the information upon which the RCMP relied, it was wrong in refusing to allow a corporal of the RCMP, who had listened to more than a thousand of the intercepted calls, to testify as to his recollection of the tapes' contents once it was shown that the tapes were unavailable. The court's concern that such testimony would not have provided appellee with sufficient opportunity "to test out the conclusion[s in the affidavit]" nor with "an opportunity at all to cross examine" (App. 519-520, 529-531, 535) was misplaced in a probable cause hearing. As the Supreme Court has observed in United States v. Matlock, 415 U.S. 164, 172-173 (1974) "the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence" (and see Matlock, supra, 415 U.S. at 173-175). Accord, Gerstein v. Pugh, supra, 420 U.S. at 119-122; McCray v. Illinois, 386 U.S. 300 (1967); Brinegar v. United States, supra, 338 U.S. at 172-174. See Rules 104(a) and 1101(d)(1), F.R. Evidence. Moreover, the officer's testimony as to the contents of the tapes was admissible as secondary evidence. Rule 1004 (2) of the Federal Rules of Evidence states that "the original is not required, and other evidence of the contents of a * * * recording * * * is admissible if -- * * * [n]o original can be obtained by any available judicial process or procedure." This Court has similarly held that "secondary evidence may be admitted in lieu of the original provided the original has not * * * become unavailable through the fault of the proponent and provided the [evidence] does not otherwise appear to be untrustworthy." United States v. Knohl, 379 F.2d 427, 441 (2nd Cir. 1967), cert. den., 389 U.S. 973. Accord, e.g., United States v. Jacobs, 475 F.2d 270, 284-285 (2nd Cir. 1973), cert. den. sub nom., Lavelle v. United States, 414 U.S. 821; United States v. Maxwell, 383 F.2d 437, 441-443 (2nd Cir. 1967), cert. den. sub nom., Aiken v. United States, 389 U.S. 1043. As the tapes here could not have been produced because of the statutory restrictions of the Canadian Protection of Privacy Act, and there had been no showing of the untrustworthiness of Rowland's testimony (see also United States v.

2. The judge's ruling that the search was illegal because the government had not produced the tapes to rebut appellee's evidence negating fraud in its representations was erroneous in another respect. Even assuming that he properly considered extrinsic evidence to impeach the information provided by the RCMP, the judge's holding that the "inaccuracies" in that information negated probable cause in the affidavit was clearly erroneous.

Although the court held that the government's claims -- that MDG, Ltd. had misrepresented to customers that diamonds would appreciate in value at the rate of 33 per cent to 60 per cent per year and that the company would buy back any diamonds that it sold at prevailing retail prices -- were refuted by evidence presented at the hearing, in our view, we do not read the court's opinion as finding that the alleged misrepresentation by appellee that there was "a ready market for the resale of diamonds so that the customer may liquidate his diamond holdings at will" (App. 23) was also contradicted. Judge Curtin in effect found, that, unless appellee's own buy-back policy was taken into account, appellee's representation of a ready market for the resale of its diamonds was deceiving since testimony showed that the diamonds could only be resold by the customer at "a substantial loss" (App. 16).^{21/} The court's conclusion, however, that this deception was

20/ (CONT'D) Matlock, supra, 415 U.S. at 175-176; McCray v. Illinois, supra, 386 U.S. at 313), the court should logically have permitted Rowland to testify.

21/ Appellee's own gemologist acknowledged at the hearing that if diamonds were purchased at the price range at which appellee sold them, an individual would have to hold a diamond from five to seven years in order to realize his purchase (App. 376-379, 383-384). Based on appellee's markups, the witness concluded that there was "a very limited market[;] * * * there is no ready market for [immediate liquidation]" for diamonds (App. 385).

counteracted by evidence that appellee had itself repurchased diamonds from its customers in numerous instances -- sometimes for "more than they had paid," and on occasion for "a bit less" (App. 17) -- was clearly mistaken. Uncontradicted evidence at the hearing showed that appellee's policy was to limit buy-backs from United States customers to seven per cent of sales (App. 424).^{22/} Appellee conceded as much below, stating (App. 88):

That buy-back sales should be limited to 7% of total sales is simply good business judgment. Any good salesman after making his product will attempt to limit instances in which refunds on his product are sought. It would simply be bad business to allow any customer calling for a buy-back to, in fact, enter into such an arrangement.

Thus, there remained ample probable cause to support the conclusion in the affidavit that appellee's representation regarding a ready resale market was fraudulent.^{23/}

22/ The office manager of MDG, Ltd. testified that she was never advised by Doren in March, 1977 that the company was "not to make arrangements for any more * * * buy-backs of diamonds [from Canadian customers]" (App. 291).

23/ Similarly, as to the claim in the affidavit that appellee fraudulently represented that its diamonds would be appraised by an independent gemologist who is a member of the Gemological Institute of America (App. 24), appellee conceded below that "we can not show that [Theodore J. Calderia, who is our appraiser] is a graduate of the Geological Institute of America" (App. 524). Although Arend was listed in appellee's sales brochure as its appraiser, Arend testified that he was never appellee's appraiser (App. 454, 465-467), and MDG, Ltd.'s office manager testified that since her employment by the company, Calderia was the only appraiser (App. 276, 283). The fact noted by Judge Curtin -- that "it was not until April 7, 1977 (six days before the search warrant application was made) that [Arend] notified [appellee] that he no longer wished to have his name utilized in [its] sales promotion" (App. 17-18) -- did not contradict the misrepresentations made by appellee about its appraiser.

CONCLUSION

It is therefore respectfully submitted that the order of the district court returning appellee's property under Rule 41 (e), F.R.Crim. Proc., be reversed.

LLOYD GEORGE PARRY,
Special Attorney,
Buffalo Strike Force.

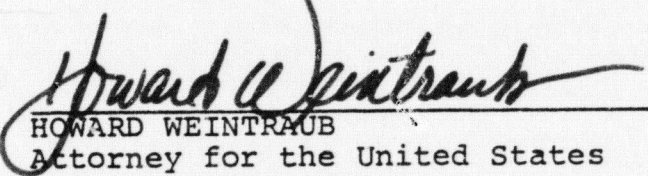
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of September
1977, a copy of the foregoing Brief and Appendix were served by
mail on the following:

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Attorney for the United States
Appellate Section
Criminal Division
Department of Justice
Washington, D.C. 20530



ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
IN THE MATTER OF A SEARCH WARRANT :
FOR THE PREMISES OF LONDON MERCHANTS, :
INC., 488 MADISON AVENUE, 5th FLOOR, :
NEW YORK, NEW YORK AND FOR SAFE :
DEPOSIT BOXES F-241, F-242, 52-450, :
52-466 LOCATED IN THE CHEMICAL BANK, :
488 MADISON AVENUE, NEW YORK, NEW YORK. :
----- x

M 18-65-CSH

MEMORANDUM OPINION AND
ORDER

HAIGHT, District Judge:

London Merchants, Inc. moves pursuant to Rule 41(e), F.R.Crim.P., for an order directing the return of its property seized pursuant to a warrant issued by Magistrate Raby of this Court. The United States opposes the motion. For the reasons stated below, the motion is denied, without prejudice to its renewal at a later date and in different circumstances.

London Merchants, Inc. is in the diamond business. It maintains offices at 488 Madison Avenue, and safe deposit boxes at the branch of the Chemical Bank located in that building. The business operation of London Merchants consists in selling diamonds to customers, by means of brochures and a campaign of telephone calls, the diamonds being described to potential customers as a profitable source of investment and resale.

Magistrate Raby issued the search warrant in question in April of 1977, acting on the basis of an affidavit sworn to by United States Postal Inspector Thomas F. Johnson. Johnson had been in communication with officers of the Royal Canadian Mounted

Police, who were conducting an investigation into a Canadian company, London House, Ltd. London House and London Merchants are closely affiliated. An individual named Rudy Hinter is president of both companies. According to the Johnson affidavit, the Royal Canadian Mounted Police had developed evidence, through court-authorized wiretaps and other sources, that London House and London Merchants were engaging in fraudulent misrepresentations to customers in connection with the diamond business.

Pursuant to the search warrant, United States Postal authorities entered and searched the premises of London Merchants at 488 Madison Avenue on April 14, 1977. They seized the books and records of the company; removed its telephones (to be used as evidence) and also seized the company's inventory of diamonds in the safe deposit boxes at Chemical Bank. London Merchants and its principal officers and employees are now the targets of a grand jury investigation pending in this district.

London Merchants, claiming that the April seizures have effectively put it out of business, moves for an order returning all of its property. The Government resists the motion, on the ground that such an order would give the company unwarranted pre-indictment discovery.

London Merchants relies primarily upon a decision of Judge Curtin in the United States District Court for the Western District of New York, United States v. Merchant Diamond Group, Inc., Misc. Crim. No. 214, decided June 27, 1977. In that case the moving party alleged, as does the movant in the present case, that factual

inaccuracies were contained in the postal inspector's underlying affidavit. Judge Curtin held a hearing to determine the nature and extent of these inaccuracies, and thereafter directed the return of the property to the movant. It is apparent, from an examination of Judge Curtin's opinion, that he was influenced by the inability of the Government to produce the tapes of Royal Canadian Mounted Police wiretaps, although the prosecutor had assured the court that the tapes would be made available. London Merchants points out, accurately, that the facts in Judge Curtin's case closely resemble the facts of the case at bar.¹

The Government has appealed Judge Curtin's decision. The appeal will be heard by the Second Circuit in October.

In passing upon motions under Rule 41(e)² for the return of property prior to the initiation of criminal proceedings flowing from the seizure of that property, the courts are guided by general principles of equity. Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975) at p. 1243. London Merchants seeks, in effect, injunctive relief. In evaluating such a request, the chancellor in equity may consider, among other factors, whether the moving party has asserted its claims promptly, and its ultimate prospects of success in the underlying case.

In the case at bar, although London Merchants protests that it has been put out of business by the seizure of its property, that seizure occurred in mid-April and the present motion was not made until mid-July. At the oral argument, counsel for London Merchants acknowledged, with commendable candor, that the motion

had been delayed in order to wait for the outcome of Judge Curtin's case. Judge Curtin having decided his case in favor of the party in a position comparable to London Merchants, London Merchants then made its present motion, relying upon that case. But the Government takes the view that decision of the present motion, or the holding of any hearings in connection with it, should wait until the Second Circuit has determined the Government's appeal from Judge Curtin's opinion.

If it was sound and practical for London Merchants to await Judge Curtin's decision before attempting to recover its property, then it is equally sound and practical for the Government to ask for a further preservation of the status quo until the Second Circuit has decided the appeal. That is particularly true, since the decision of the Second Circuit may well be dispositive of the present motion. That is to say, London Merchants having accepted a three-month delay for tactical purposes in seeking the return of its property, the Government may in these circumstances reasonably request an equal delay (three months, July to October) for comparable reasons.

I also note that the Government has consented to make London Merchants' records available to it for inspection and copying, in order to permit a continuation of business.

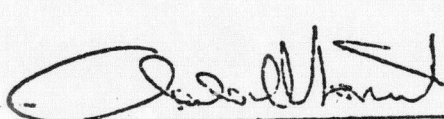
On the question of ultimate success, I am bound to observe that Judge Curtin's order, directing return of the seized property because of perceived inaccuracies existing in the postal inspector's affidavit underlying the warrant, cited no Second Circuit authority.

That court has recently held, however, that only perjury by an affiant would invalidate a search warrant based upon his affidavit; and that the accuracy of the information provided by the affiant's informant was not relevant. Kahn v. Flood, 550 F.2d 784 (2d Cir. 1977). In the case at bar, it appears that Postal Inspector Johnson's affidavit was based entirely upon information received from the Royal Canadian Mounted Police and other sources. While London Merchants is not foreclosed from arguing that Mr. Johnson committed perjury in connection with his affidavit, the prospects of success in that contention would appear to be remote.

In these circumstances, I conclude that London Merchants is not entitled to relief under Rule 41(e) at this time. The motion is accordingly denied, without prejudice to its renewal following decision by the Court of Appeals on the appeal taken from Judge Curtin's order.

It is So Ordered.

Dated: New York, New York
July 29, 1977


CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. That is to say, the nature of the business involved, the genesis of the investigation, and the Government's allegations of fraud appear almost identical. It is true, as the Government points out, that it has made no promise in the instant case to produce the wiretap tapes. The Canadian authorities have not yet authorized their release.
2. Rule 41(e) provides:

"Motion for return of property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

